



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Conwal, Inc.

File: B-279260; B-279260.2

Date: May 26, 1998

J. Patrick McMahon, Esq., McMahon, David & Brody, for the protester.
Gerald H. Werfel, Esq., Pompan, Murray, Ruffner & Werfel, for Analytical Sciences, Inc., an intervenor.
Michael Colvin, Department of Health & Human Services, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Even if the protester's allegations with respect to the reasonableness of the agency's evaluation of the awardee's cost proposal had merit, the protester has failed to show that it was prejudiced by the agency's evaluation of the awardee's proposed costs.

DECISION

Conwal, Inc. protests the award of a contract to Analytical Sciences, Inc. (ASI) under request for proposals (RFP) No. 200-97-0610(P), issued by the Department of Health & Human Services, Public Health Service, Centers for Disease Control and Prevention, for the development, identification, collection, and dissemination of disease prevention communication and information materials through the operation of a Prevention Information Network. Conwal challenges the reasonableness of the agency's evaluation of ASI's cost proposal.

We deny the protests.

The RFP contemplated the award of a cost-plus-fixed-fee contract for the base period and four 1-year option periods. The RFP provided that the award would be made to the offeror whose integrated proposal (technical proposal, business proposal, oral presentation materials, past performance information, responses to sample tasks, and best and final offer (BAFO)) offered the highest technical merit at the best overall value to the government. The RFP also provided that where competing proposals were determined to be substantially equal, past performance and/or cost would become controlling factors.

Of the four proposals initially submitted, the proposals of Conwal and ASI were included in the competitive range. Following technical and cost discussions and oral presentations, both offerors submitted BAFOs. The agency determined that the proposals of Conwal and ASI were technically acceptable. (Conwal's proposal received a slightly higher--by approximately 6.5 percent--technical score.) Conwal's evaluated cost was approximately 6 percent, or \$2.2 million, higher than ASI's evaluated cost. The agency determined that because the proposals of Conwal and ASI, based on their respective strengths and weaknesses, were substantially equal, overall cost would be the determining factor for award. Accordingly, the agency awarded the contract to ASI, whose technically equal, low evaluated cost proposal was determined to represent the best value to the government.

Conwal complains that ASI improperly fragmented its general and administrative (G&A) expense pool by separately creating a subcontractor G&A expense pool to which a lower indirect percentage rate would be applied. More specifically, in its BAFO, ASI noted that the agency recently finalized a new indirect rate agreement which included provisional rates for 1997. For this procurement, ASI proposed a non-subcontractor G&A rate lower than its provisional rate. (Starting from ASI's full provisional rate, ASI's non-subcontractor G&A rate will have cumulatively been reduced by 1.5 percent by the fourth option period.) In addition, ASI separately proposed a fixed subcontractor G&A rate, which was even lower than the firm's non-subcontractor G&A rate, for the entire period of contract performance. As requested by the agency during discussions, ASI agreed in its BAFO to a specific indirect percentage rate ceiling on its non-subcontractor and subcontractor G&A expense pools.¹ Conwal basically contends that the agency unreasonably accepted ASI's creation of a separate subcontractor G&A expense pool, to which a lower indirect percentage rate would be applied, thus providing ASI with an unfair competitive advantage resulting in its ability to submit the low evaluated cost proposal. However, the agency's evaluation and source selection documentation included in the record shows that even if it is assumed, arguendo, that the agency was unreasonable in accepting ASI's separate non-subcontractor and subcontractor G&A expense pools, Conwal was not prejudiced.

¹During discussions, Conwal and its only proposed subcontractor, the incumbent contractor, were asked to agree to an indirect (G&A) percentage rate ceiling. In its BAFO, Conwal conditioned its agreement to such a ceiling on the amount of work from the agency being at, or approximating, the amount of work upon which Conwal's proposal was based. Conwal concluded that this constituted "a promise based upon a condition." In addition, Conwal's subcontractor did not agree to a ceiling.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

Even if we were to agree with Conwal that ASI's creation of a separate subcontractor G&A expense pool was improper, the record shows that ASI gained no competitive advantage by proposing to account for subcontractor G&A expenses separate from non-subcontractor G&A expenses. The record shows that ASI's separate subcontractor G&A expense pool is less than 10 percent of the value of ASI's non-subcontractor G&A expense pool. If ASI's two separate G&A expense pools are combined, that is, if ASI's subcontractor G&A expenses are added to its non-subcontractor G&A expenses, and the agreed-upon ceiling rate and applicable fees are applied, ASI's total (subcontractor and non-subcontractor) G&A expenses remain significantly less than Conwal's total G&A expenses by approximately 20 percent. Moreover, just as ASI's lower, declining provisional rate was applied to the firm's non-subcontractor G&A expense pool (to which Conwal does not object), if, for the sake of argument, ASI's full provisional rate were applied to ASI's subcontractor G&A expense pool, the effect on ASI's total (subcontractor and non-subcontractor) G&A expenses, including the agreed-upon ceiling rate and applicable fees, would not be significant, that is, there would be an approximate 1-percent increase in ASI's combined G&A expense pool with ASI's total G&A expenses remaining approximately 20 percent less than Conwal's total G&A expenses. On this record, Conwal has not shown how it was prejudiced by the agency's acceptance of ASI's alleged improper fragmentation of its G&A expense pool. In this regard, we find unpersuasive Conwal's argument that it was somehow prejudiced because the agency denied it an opportunity to also improperly fragment its G&A expense pool in order to apply a separate, lower rate for material handling.

Conwal also complains that in evaluating the realism of ASI's proposed subcontractors' cost proposals, the agency improperly waived its previous direction during discussions that the subcontractors provide additional documentation to support various cost elements in their respective cost proposals.

The record shows that the agency noted with respect to cost issues outstanding for each of ASI's five proposed subcontractors that "[s]hould ASI be awarded this procurement, consent should be withheld on the proposed subcontract between ASI and [named subcontractor] until the [agency] receives [additional information regarding particular cost issues] and confirms that the proposed [rate(s)] [is/are] fair and reasonable." The agency nevertheless concluded that the subcontractors' proposed costs were reasonable for estimating purposes and that "[a]ll matters of substance were resolved to the mutual agreement of the parties, except for the issues noted regarding the proposed subcontracts. Should this offeror be awarded

the resultant contract, the subcontract issues should be resolved before consent to subcontract is granted." The record also shows that the agency treated Conwal and its only proposed subcontractor in the same manner as it treated ASI and its proposed subcontractors. Specifically, the agency stated in the record that if Conwal were awarded the contract, consent should be withheld on the firm's proposed subcontract until issues involving the subcontractor's proposed escalation rate and ceiling on indirect rates were resolved. On this record, Conwal has failed to show how it was prejudiced where the agency accorded the same treatment to Conwal and ASI with respect to outstanding subcontract cost issues.² We further point out that the agency has advised that outstanding subcontract cost issues have been resolved with ASI and the contracting officer has consented to each of ASI's proposed subcontractors.

Accordingly, while the proposals of Conwal and ASI were determined to be substantially equal, ASI's total evaluated cost was lower than Conwal's. Consistent with the terms of the RFP which provided that where competing proposals are determined to be substantially equal, past performance and/or cost would become controlling factors, we have no basis to question the award to ASI, the offeror submitting the low evaluated cost proposal which was determined to represent the best value to the government. See, e.g., Theta Eng'g. Inc., B-271065, B-271065.2, June 12, 1996, 96-2 CPD ¶ 76 at 9-10.

The protests are denied.³

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²Conwal contends that one of ASI's proposed subcontractors understated its proposed costs by \$1 million. Conwal further complains that three other ASI proposed subcontractors failed to sufficiently document a total of approximately \$150,000 in proposed costs (which the record shows the agency considered minor). The record shows that even if the alleged understated and insufficiently documented amounts, along with applicable fees, increased subcontractor G&A expenses, and the agreed-upon ceiling rate, are added to ASI's total cost-plus-fixed-fee, the basis upon which the award was made, ASI's evaluated cost remains at least 1.6 percent, or approximately \$585,000, less than Conwal's.

³In its comments on the agency report, Conwal withdrew its arguments regarding the agency's evaluation of its technical proposal, including past performance.